

**KELLEY DRYE & WARREN LLP**

A LIMITED LIABILITY PARTNERSHIP

**WASHINGTON HARBOUR, SUITE 400**

**3050 K STREET, NW**

**WASHINGTON, DC 20007**

(202) 342-8400

FACSIMILE

(202) 342-8451

www.kelleydrye.com

STEVEN A. AUGUSTINO

DIRECT LINE: (202) 342-8612

EMAIL: saugustino@kelleydrye.com

NEW YORK, NY  
CHICAGO, IL  
HOUSTON, TX  
LOS ANGELES, CA  
SAN DIEGO, CA  
PARSIPPANY, NJ  
STAMFORD, CT  
BRUSSELS, BELGIUM  
  
AFFILIATE OFFICE  
MUMBAI, INDIA

June 26, 2019

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation, XO Communications Services, LLC,  
*Application for Review by XO Communications Services, LLC of Decision*  
*of the Wireline Competition Bureau*, CC Docket Nos. 96-45 and 97-21,  
WC Docket No. 06-122

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, XO Communications Services, LLC ("XOCS") provides notice that on June 24, 2019, its counsel, Steven A. Augustino and Chris M. Laughlin of Kelley Drye & Warren, LLC, met with Ryan Palmer, Division Chief; Karen Sprung, Assistant Division Chief; Claudia Fox, Attorney Advisor; and Elizabeth Skerry, intern, all of the Telecommunications Access Policy Division of the Wireline Competition Bureau ("Bureau").

At the meeting, XOCS reiterated several points from its June 4, 2019 letter, which explained that, if the Bureau does not overturn its March 30, 2017 *Private Line Order*,<sup>1</sup> as XOCS requested in its May 1, 2017 application for review,<sup>2</sup> it should follow the precedent of the Federal Communications Commission ("FCC" or "Commission") by granting a retroactive

<sup>1</sup> *In the Matter of XO Communications Services, Inc., Request for Review of Decision of the Universal Service Administrator et al.*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122, Order, 32 FCC Rcd 2140 (rel. March 30, 2017).

<sup>2</sup> *XO Communications Services, LLC Application for Review of Decision of the Wireline Competition Bureau*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122 (May 1, 2017) ("*Application for Review*").

Ms. Marlene H. Dortch  
June 26, 2019  
Page 2

waiver or applying the *Order* only prospectively. Waiver or prospective relief are appropriate because of the widespread confusion regarding the private line rule that preceded the Bureau's order. Prior to the *Private Line Order*, the Commission's consistent and repeated statements regarding customer certifications under the Ten Percent Rule created a widespread and reasonable understanding within the industry that carriers need only obtain customer certifications when more than ten percent of traffic on their private lines are interstate.<sup>3</sup> XOCS highlighted the prior Commission orders that created this reasonable expectation.<sup>4</sup>

XOCS also explained that the Commission has recently granted retroactive waivers to parties in similar situations, based on confusion about application of Commission rules. In a June 13, 2019 order, the Consumer and Governmental Affairs Bureau ("CGB") granted waivers to Bebe Stores, Inc. and ViSalus, Inc. of the Commission's rules requiring prior express written consent for telemarketing calls.<sup>5</sup> CGB found that the companies were similarly situated to companies that had been granted similar waivers in the Commission's 2015 *TCPA*

---

<sup>3</sup> *Letter in Support of Application for Review*, CC Docket Nos. 96-45, 97-21, WC Docket No. 06-122 (May 1, 2017) ("*Letter*").

<sup>4</sup> *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 4 FCC Rcd 1352, 1357, ¶ 32 (1989) (adopting the Ten Percent Rule with a recommendation of the Federal-State Joint Board on Universal Service that so-called "mixed use" private lines be allocated to the intrastate jurisdiction unless there is a showing "*through customer certification* that each special access line carries more than a *de minimis* amount of interstate traffic") (emphasis added); *Petition for an Expedited Declaratory Ruling filed by National Association for Information Services, Audio Communications, Inc., and Ryder Communications, Inc.*, 10 FCC Rcd 4153, 4161, ¶ 17 (1995) (summarizing the Ten Percent Rule and stating that "a subscriber line is deemed to be interstate *if the customer certifies* that ten percent or more of the calling on that line is interstate.") (emphasis added); *GTE Telephone Operating Cos., GTOC Transmittal No. 1148*, 13 FCC Rcd 22466, 22481, n. 95 (1998) (concluding that DSL services were interstate in part because GTE configured its lines to carry more than a *de minimis* share of interstate traffic and said that it would "ask every ADSL customer to certify that ten percent or more of its traffic is interstate."); *MTS and WATS Market Structure, Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, 16 FCC Rcd 11167, ¶ 2 (2001) (reaffirming the continued use of the Ten Percent Rule for Part 36 jurisdictional separations and stating that "mixed-use lines would be treated as interstate *if the customer certifies* that more than ten percent of the traffic on those lines consists of interstate calls.") (emphasis added).

<sup>5</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petitions for Waiver and/or Retroactive Waiver of 47 CFR Section 64.1200(a)(2) Regarding the Commission's Prior Express Written Consent Requirement*, CG Docket No. 02-278, DA 19-562 (rel. June 13, 2019).



KELLEY DRYE & WARREN LLP

Ms. Marlene H. Dortch

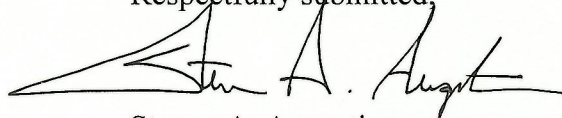
June 26, 2019

Page 3

*Declaratory Ruling.*<sup>6</sup> The 2015 TCPA Declaratory Ruling explained that while the FCC's 2012 TCPA Order established new requirements for what constitutes prior express written consent, language in the order "*could have reasonably been interpreted* to mean that written consent obtained prior to the current rule's effective date would remain valid even if it does not satisfy the current rule."<sup>7</sup> XOCS explained that under this precedent, it is within the Bureau's authority to grant a retroactive waiver to XOCS because the Ten Percent Rule could have been reasonably interpreted by the industry to only require certifications when more than ten percent of traffic on their private lines are interstate. In light of this confusion, a retroactive waiver to XOCS of the private line rule would be appropriate.

For the reasons discussed above and in XOCS prior submissions, XOCS respectfully requested that the Bureau act promptly to grant a retroactive waiver or prospective relief of the new standards in the Commission's *Private Line Order*. Please do not hesitate to contact me with any questions or concerns.

Respectfully submitted,



Steven A. Augustino

*Counsel to XO Communications Services, LLC*

cc: FCC personnel above

---

<sup>6</sup> *Id.* at ¶ 11.

<sup>7</sup> *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Declaratory Ruling and Order, 30 FCC Rcd 7961, ¶ 101 (2015) (emphasis added) ("2015 TCPA Declaratory Ruling").